Supreme Court, U.S.
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No. 01-914

IN THE

# Supreme Court of the United States

ABX AIR, INC.,

*Petitioner,*

*v.*

AIRLINE PROFESSIONALS ASSOCIATION OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL UNION NO. 1224, AFL-CIO,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

## BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the Sixth Circuit properly concluded that flight crew members' exercise of a contractual right not to volunteer for extra assignments, even if done in concert, does not constitute a strike where all flights are assigned and flown in accordance with the collective bargaining agreement and, thus, where there are no flights canceled or delayed and no interruption of the carrier's operations.

2. Whether the Sixth Circuit properly held that this case presents a minor dispute that does not implicate the status quo requirements of the Railway Labor Act and that is within the exclusive jurisdiction of a System Board of Adjustment and not of the courts.

3. Whether the Sixth Circuit's decision is consistent with, or distinguishable from, this Court's precedent and decisions from other circuits.

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## STATEMENT OF THE CASE

Despite the Petitioner's rather overwrought assertions about the state of the air transportation industry and the potential effects of the Sixth Circuit's decision on the dispute resolution processes of the Railway Labor Act, this case actually presents a very limited and fact-specific dispute under the parties' collective bargaining agreement. The contract at issue is between ABX Air, Inc. ("ABX" or "the Company"), a cargo carrier engaged mainly in the overnight delivery of small packages, and the union representing its pilots and professional flight engineers (referred to, collectively, as "crewmembers"), the Airline Professionals Association of the International Brotherhood of Teamsters, Local Union No. 1224 ("Local 1224" or "the Union"). The dispute concerns the contractual rights of the crewmembers to decline to bid for voluntary extra assignments and whether a concerted exercise of that choice can constitute a strike, where the employer uses contractual mechanisms to staff all flights and where not a single flight is cancelled or even delayed.

The case involves voluntary bidding for "open flying," flights in ABX's schedule that have not been bid upon and assigned to crewmembers as part of initial monthly work schedules or that have become open because of a crewmember's absence, an assignment change or otherwise. Under the collective bargaining agreement, open flying is first assigned to crewmembers who require additional flights to meet their minimum monthly hours under the contract or to make up days of work lost for some reason. Contract, Preliminary Injunction Hearing Jt. Ex. 1, Article 13, Section E1.-2., Appendix 1a. Any trips that still remain open then "shall be awarded in accordance with seniority to any

crewmember bidding a particular trip *who wishes to pick up additional flying* (days and/or hours) on a previously scheduled work day, or day off." (Emphasis added.) *Id.* Section E.3, Appendix 2a.

Representatives of both parties testified it is voluntary and discretionary for an individual employee to volunteer for open flying assignments; some frequently bid for open flying, while others do so only rarely. The contract sets no limitations on the crewmembers' discretion in this respect; they do not need a good reason, or even any reason at all, not to volunteer for open flying. It makes no difference under the contract whether the crewmember declines to bid because he or she is angry at the Company, wishes to make common cause with his or her fellow crewmembers or simply wants to preserve leisure or family time. The number of flights bid through open flying varies dramatically both from month to month and from crewmember to crewmember. No crewmember has ever been disciplined for failing to bid for open flying. Preliminary Injunction Hearing Transcript (hereinafter "Hearing Tr.") 38-40, 53-54, 104, 127, 132-33, 156, 168-69, 174, 298-300, 318.

The parties negotiated for two separate, contractual means of assigning open trips when there is an insufficient level of voluntary bidding to cover ABX's crewmember requirements. First, if the regular line holders (that is, crewmembers other than reserve pilots) as a group do not bid the equivalent of one open trip each, the Company may assign the open trips in reverse seniority order, at one trip each, to those crewmembers in the bottom 75 percent of the seniority list. If the specified number of open trips still are not filled, ABX may assign a second open trip each to crewmembers in the bottom 50 percent of the list.

The compensation for employees assigned through the "bottom 75-bottom 50" method is the same as if they had bid for the trips voluntarily. Second, ABX may make assignments to crewmembers in reverse seniority order, a process referred to as "junior manning." Crewmembers given an additional assignment through junior manning receive a premium in the amount of 2.5 hours of pay beyond the nc mal pay for the trip; however, some of that premium is offset by the fact that more junior — and therefore lower paid — crewmembers are subject to these assignments. Contract, Article 13, Sections E.3, E.4, L & N.7; Appendix at 2a-4a.

All of these scheduling and assignment provisions are contained in the contract between the parties that was executed on June 25, 1997. It is undisputed that, almost immediately after agreement was reached on this contract, there arose a number of disputes about the proper interpretation and application of various provisions, many but not all of which related to crew scheduling. Other grievances remained from the period of the prior collective bargaining agreement. Although the District Court concluded that the main point of contention related to a scheduling rule requiring three consecutive days off, and the Sixth Circuit refused to disturb that finding as not clearly erroneous, this was just one of many pending disputes between the parties. *See* District Court's Findings of Fact and Conclusions of Law, Nov. 12, 1999 (hereinafter "Findings & Conclusions"), Cert. Petition App. at 19a-20a;[1] Opinion of the Sixth Circuit (hereinafter "Appellate Opinion"), Cert. Petition App. at 3a, 8a-9a.

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1. The lower courts' decisions are reproduced in the appendix to the Petition for a Writ of Certiorari and will be cited to here as "Cert. Petition App. at __."

By August 1997, many crewmembers had become unhappy with the pace at which the various grievances were being addressed, by both the Company and the Union, and with the expense to the Union of paying its officers — all of whom are full-time ABX crewmembers — when they must miss scheduled work in order to conduct Union business. At a Union meeting in August, the Union's President announced that he and other members of the Executive Board had determined not to bid open flying so they could devote more time to resolving the pending issues. The crewmembers present at the meeting applauded this decision by the Executive Board; without prompting from any Union officers, a number of them indicated they also would prefer not to bid open flying. The parties disputed the level of encouragement the Union later offered; Local 1224's President at one point did refer to the Union officers' voluntary participation in a "membership-driven open flying ban." Hearing Tr. 97-98, 106-07, 119, 123-27, 131-32, 136-37, 144-52, 169, 171.

There was no voluntary bidding for open flying in September 1997 and relatively little in October. However, all flights were covered by the Company's reserve crewmembers and through the contractual means for assigning the trips. There was no evidence of a single crewmember refusing to accept a bottom 75 — bottom 50 or junior manning assignment. Not one plane was grounded and not one flight was cancelled or even delayed because of the crewmembers' decisions not to volunteer for the extra assignments. Open flying bidding in a more normal pattern resumed by December. District Court Memorandum & Order, Oct. 1, 1997, at 3, 7-8; Findings & Conclusions, Cert. Petition App. at 21a-22a.

At most, ABX estimated that covering flights through the alternative means rather than through voluntary bidding cost it $200,000 for the two months involved. Findings & Conclusions, Cert. Petition App. at 22a. However, this figure must be considered in the context of the Company's overall expenses and revenues, the latter of which ABX's Chief Executive Officer testified was $10 million *per day*. Trial Transcript, Aug. 3, 1999, at 93. ABX also alleged it had "lost" $3 million when it declined to bid for certain Christmas-season mail charter business; this was extra work, outside of its normal operations, that the Company had bid for and performed on occasion in the past. ABX asserted that it did not try to compete for this work in 1997 because it conjectured that crewmembers might not be available to fly the trips. However, the appellate court noted that this work was outside the Company's "regular business base," which was not impaired by the open flying action. Cert. Petition App. at 4a, 13a.

As required by the Railway Labor Act ("RLA"), the parties' collective bargaining agreement establishes a grievance procedure that culminates in a hearing before the Arbitration System Board of Adjustment, chaired by a neutral, third party arbitrator. Contract, Article 16. Both the Company and the Union are empowered to bring a grievance or dispute to the adjustment board, but ABX did not file a grievance over the open flying issue. Instead, it filed a lawsuit seeking injunctive and other relief in the United States District Court for the Southern District of Ohio. After an evidentiary hearing on ABX's motion for preliminary injunction, the court initially ruled that the open flying ban had not interrupted the Company's operations and that the court had no jurisdiction to enjoin the crewmembers' actions. Memorandum and Order, Oct. 1, 1997. However, after

briefing on motions for summary judgment and further testimony at trial, the District Court essentially reversed itself. It held that "the applicable definition of the term 'strike' includes concerted activity by employees, pending resolution of a minor dispute, that disrupts the employer's operations and *causes a loss of business or profit* with the intention of exerting pressure upon the employer to change its interpretation of the existing collective bargaining agreement." Order, April 9, 1999, at 15-16 (emphasis added). Applying this definition, the District Court held that the crewmembers' activity did not constitute a "slowdown" but did create an "interruption of operations" and thus a "strike;" it enjoined such action in the future. Findings & Conclusions, Cert. Petition App. at 25a-27a.

On appeal, the Sixth Circuit reversed the judgment of the District Court. It held that, for a concerted action to amount to a strike or "a 'concerted interruption of operations' requires more than higher operational costs incurred by the necessary exercise of contract provisions and alleged losses from foregone contract opportunities." Appellate Opinion, Cert. Petition App. at 13a. Because the Company used contractually agreed processes "to legally assign crew members to open flights, and did not suffer staffing or flight interruptions . . . ABX's economic injuries do not qualify the crew members' concerted ban on open-flying bidding as a 'strike'" as defined by the RLA. *Id.* at 13a-14a. ABX is seeking review of that conclusion in this Court.

## REASONS FOR DENYING THE WRIT

### I.

### THE SIXTH CIRCUIT PROPERLY CONCLUDED THAT THE CREWMEMBERS' EXERCISE OF A CONTRACTUAL RIGHT NOT TO VOLUNTEER FOR EXTRA ASSIGNMENTS DID NOT CONSTITUTE A STRIKE WHERE ALL FLIGHTS WERE ASSIGNED AND FLOWN IN ACCORDANCE WITH THE PARTIES' CONTRACT AND WHERE THERE WERE NO CANCELED OR DELAYED FLIGHTS AND NO INTERRUPTION IN THE CARRIER'S OPERATIONS.

The issue before the Sixth Circuit was whether, under the parties' contract and under all of the factual circumstances, the crewmembers' refusal simply to *volunteer* for open flying assignments, without refusing to *perform* them, constituted a "strike" within the meaning of the Railway Labor Act that was within the federal courts' jurisdiction to enjoin. It correctly ruled that the activity here did not rise to the level of a strike, which it defined as a work stoppage or an "interruption of operations." The Petitioner urges this Court to overrule that finding, pressing an interpretation of the term "strike" that is inconsistent both with any statutory or case-law definition and with common sense.

The RLA does not define the word "strike," and both the District Court and the Sixth Circuit looked for guidance to the definition in the National Labor Relations Act, 29 U.S.C. § 142(2), which includes a "concerted interruption of operations by employees." Leaving aside the question of whether the NLRA definition can be analogized to the quite different statutory scheme of the RLA, at a minimum the concept of an "interruption" should mean an interruption in

a carrier's transportation services, not some mere additional expense or inconvenience to the carrier.

The RLA was designed to protect the provision of transportation and shipping services to the public, not to protect the profits of an individual carrier.

> The purpose of the Railway Labor Act was to provide a framework for peaceful settlement of labor disputes between carriers and their employees to insure to the public continuity and efficiency of interstate transportation service, and *to protect the public from injuries and losses* consequent upon any impairment or interruption of interstate commerce through failures of managers and employees to settle peaceably their controversies. H.R. Rep. No. 328, 69th Cong., 1st Sess. p. 1.

*Union Pac. R.R. v. Price*, 360 U.S. 601, 609 (1959) (emphasis added). The RLA's controlling theme — "to avoid any interruption to commerce or to the operation of any carrier engaged therein" — is recited in the language of the statute itself, 45 U.S.C. § 151a(1), and appears many times throughout its legislative history. Congress was concerned with the interests of the public, including those of travelers and shippers, if the trains did not run. *See, e.g.*, Legislative History of the RLA 217 (ABA Section on Labor and Employment Law, 1988) (Representative Barkley) (declaring that the public's interest in "the continuous and uninterrupted transportation of the necessaries of life and of industry" formed the basis for Congressional and court action regarding the settlement of railroad labor disputes). *See also, e.g.*, *Consolidated Rail Corp. v. Railway Labor Execs.' Ass'n*

*("Conrail")*, 491 U.S. 299, 311 (1989) (RLA's purpose is to "diminish the risk of *interruptions in commerce*" and to avoid self-help actions that might "disturb *transportation services*") (emphasis added); *Pan Am. World Airways, Inc. v. Independent Union of Flight Attendants ("Pan Am.")*, 93 Lab. Cases (CCH) ¶ 13307 at 20,037 (S.D.N.Y. 1981) (RLA imposes certain obligations on both parties to a labor contract "in order to avoid interruptions in common carrier *service*") (emphasis added). The "interruption[s] to commerce or to the operation of any carrier" with which the RLA is concerned, then, are those that may cause injury or loss to the public, not merely affect a carrier's costs or profits.

In this case, the Sixth Circuit applied these standards and correctly concluded that there was no "interruption of operations" at ABX within the meaning of the statute. It was undisputed that, during the two months when most crewmembers declined to bid for open flying, the Company utilized effectively the procedures the parties had bargained for and was able to assign all open trips to its crewmembers. Not one employee refused to fly a trip that was assigned through the contractual alternatives to voluntary open flying. Most significantly, *not a single ABX flight was cancelled or delayed* because of the refusal of crewmembers merely to volunteer for open flying. Consequently, the crewmembers' action did not constitute a "strike" or an act of self-help and, as will be discussed below, it was not within the jurisdiction of the courts to enjoin.

ABX cites several cases where activity that was something less than an out-and-out work stoppage was enjoined. In contrast to the present case, however, all of those cases involved concerted activity that created substantial interruptions and disruptions in the carrier's daily operations.

For example, in *Delta Air Lines, Inc. v. Air Line Pilots Association, International*, 238 F.3d 1300 (11th Cir. 2001), the crewmembers refused to request voluntary open flying. However, unlike in the ABX-Local 1224 agreement, the alternative contractual mechanisms for assigning trips were "limited" and insufficient to allow the carrier to cover all of its flights; the crewmembers also allegedly avoided taking calls from the company that would have resulted in involuntary assignments. 238 F.3d at 1302, 1303. In those circumstances, the crewmembers' refusal to volunteer for *or* accept additional assignments forced the carrier to cancel some 5,200 passenger flights in six weeks because of a lack of pilots (compared to a normal average of just one or two flights out of a total of 2,700 flights daily).

Similarly, in *United Air Lines, Inc. v. International Association of Machinists*, 243 F.3d 349 (7th Cir. 2001), a campaign of slow-downs, "work-to-rules" actions and other activities by a passenger airline's mechanics resulted in significant effects on its operations. Among other things, the carrier's rate of maintenance "write-ups" on aircraft spiked, the number of aircraft held out of service for unscheduled maintenance doubled and then tripled over its usual average and, most significantly, the number of flights delayed or cancelled because of mechanical problems rose enormously, amounting to double the usual number during a November holiday travel season.

In *American Airlines, Inc. v. Allied Pilots Association*, 228 F.3d 574 (5th Cir. 2000), an illegal "sick-out" caused the cancellation of thousands of flights, costing the carrier tens of millions of dollars in lost revenues and affecting hundreds of thousands of passengers. *See also National R.R. Passenger Corp. v. American Fed. of R.R. Police*, 613

F. Supp. 602 (D.D.C. 1985) (Amtrak police officers engaged in "blue flu" sick-out and picketing with the effect of cancelled and delayed railroad service).

Indeed, *all* the reported cases relating to refusals to work overtime, sick-outs and other job actions short of full-blown strikes, whether under the RLA or the NLRA, have involved some identifiable interruption in the employer's production or services. *See, e.g., Philadelphia Newspapers, Inc. v. Newspaper & Mag. Employees Union*, 647 F. Supp. 236, 242 (E.D. Pa.) (mass exercise of job assignment "bumping" rights led to delays in production of newspaper on two shifts), *aff'd*, 808 F.2d 1517 (3d Cir. 1986); *American Ship Bldg. Co. v. Local Union 358, Bhd. of Boilermakers*, 459 F. Supp. 491 (N.D. Ohio 1978) (employees' concerted refusal to work overtime caused "significant delays in the production schedules regarding ships presently under construction or conversion"); *Texas Int'l Airlines v. Air Line Pilots Ass'n*, 518 F. Supp. 203, 207 (S.D. Tex 1981) (various actions by pilots delayed flights); *Pan Am.*, 93 Lab. Cases (CCH) ¶ 13307 (sick-out caused delays and understaffed flights); *Long Island R.R. Co. v. System Fed. No. 156*, 289 F. Supp. 119, 125 (E.D.N.Y. 1968) (refusal of railroad carmen to work overtime resulted in backlog of work and cancellation of significant number of scheduled trains); *United Airlines v. International Ass'n of Machinists*, 54 L.R.R.M. (BNA) 2154 (N.D. Ill. 1963) (concerted refusal to work overtime resulted in a "decrease in utilization of plaintiff's airplanes [and] an increase in the backlog of repair and maintenance work to be performed").

In this case, however, ABX simply cannot argue with any force that there was an interruption to its flight or transportation operations. It therefore is reduced to trying to

make a case that the relatively slight additional expense involved in assigning open flights through contractual means other than open flying makes the pilots' action "self help" that can be enjoined in the same manner as a strike. The Sixth Circuit quite sensibly held that, although "higher costs and lost business opportunities can serve as evidence of an interruption of operations, ABX did not suffer sufficient economic harm in this case to show an 'interruption of operations.'" Appellate Opinion, Cert. Petition App. at 12a. The only loss that ABX proved was the estimated increased cost in premium pay of $200,000 over two months — a minimal amount when its revenues for the same period amounted to roughly $400 million.[2] It also claims a "loss" of $3 million for Christmas-season charter work (again, a relatively small amount for a company of this size). However, this claim is speculative at best, as the Company did not even bid for the work based on the mere possibility, unsupported by any facts, that it might not have pilots available to staff the charters. *Id.* at 4a, 12a.

ABX argues, essentially, that *any* activity of a union that puts any sort of economic pressure on an employer is an unlawful strike, a view the Sixth Circuit appropriately rejected. This argument ignores both the fact that the RLA was enacted to protect the public, not carriers, and the reality that a variety of activities by employees or their union may exert pressure, economic or otherwise, on an employer but still be perfectly legal. Equating a "loss of business or profit" with an "interruption of operations" would threaten many forms of expression that qualify for statutory or constitutional protection. Handbilling, for example, may cause people to

2. This figure is based on the Company's own statement of daily revenues of roughly $10 million per day, multiplied by a conservative 20 work days per month for the two months at issue.

refrain from utilizing an employer's services, with economic effects, yet it is a lawful activity in which union members may freely engage. Unions also may publicize labor disputes by informational picketing, media handouts, billboards, news interviews and advertisements, as well as through contacts with the carrier's customers, suppliers or vendors. All of these activities are designed to bring pressure to bear against the carrier, and each is capable of causing economic harm in the form of lost business or profit, yet none is thought to violate the RLA. *See, e.g., Railway Labor Execs. Ass'n v. Wheeling & Lake Erie Ry.*, 914 F.2d 53, 56 (4th Cir. 1990) (picketing is a form of free speech protected by the First Amendment); *Federal Express v. International Bhd. of Teamsters*, 617 F.2d 524 (9th Cir. 1980) (Norris-LaGuardia Act barred district court from enjoining informational picketing by a union where neither party could point to any procedure of the RLA that the union had failed to follow).

In this case, the Union members' actions were within the terms of the parties' contract, which specifically contemplates that not all open trips will be staffed through voluntary bidding and which provides the Company effective, if sometimes slightly more costly, methods of assigning the trips. ABX may dislike that process, but it is part of its bargain with the Union; the mere fact that there is more cost involved if the crewmembers do not bid voluntarily does not make their actions unlawful self-help. By way of analogy, the Company at least hypothetically could hire more full-time pilots to cover its lines of time and to serve as reserve crews, decline charter work or take other steps to reduce or even eliminate flights available to be assigned by bidding and junior manning and in any number of other ways reduce the crewmembers' compensation. By simply declining to exercise its contractual right to assign certain flights as extra work,

ABX obviously could affect the crewmembers economically — but it likely would not consider itself to be engaged in a breach of contract or in unlawful economic self-help.

There are costs for both sides associated with a collective bargaining agreement. ABX, concerned about the level of voluntary bidding on open flying, successfully negotiated provisions allowing it to involuntarily assign crewmembers to trips; the cost to it was the payment of a premium for some of those involuntary assignments. The Sixth Circuit properly rejected ABX's assertion that the additional cost to it, which it agreed to in the contract, in itself could make the crewmembers' exercise of a contractual right into a strike, in the absence of any effect on its flight schedules or on public commerce.

## II.

## THE SIXTH CIRCUIT PROPERLY HELD THAT THE ISSUES IN THIS CASE REPRESENT MINOR DISPUTES THAT DO NOT IMPLICATE THE "STATUS QUO" REQUIREMENTS OF THE RAILWAY LABOR ACT AND THAT ARE WITHIN THE EXCLUSIVE JURISDICTION OF A SYSTEM BOARD OF ADJUSTMENT AND NOT THE COURTS.

The Sixth Circuit correctly ruled that the dispute between the parties in this case is a "minor" one within the meaning of the RLA and that the courts therefore had no jurisdiction to become involved in the open flying issue absent a strike.

This Court has read the RLA as creating different standards and mechanisms for dispute resolution based on whether the particular dispute is "major" or "minor." A minor

dispute is defined as "a dispute related either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case." *Elgin, Joliet & E. Ry. Co. v. Burley*, 325 U.S. 711, 723 (1945). By contrast, a "major dispute" is one that "relates to disputes over the formation of collective agreements or efforts to secure them. [Major disputes] arise where there is no such agreement or where it is sought to change the terms of one. . . ." *Id.* Above the level of negotiation and conference, minor and major disputes "follow a separate procedure." *Brotherhood of R.R. Trainmen v. Chicago River & Ind. R.R. Co.*, 353 U.S. 30, 35 (1957); *see generally* RLA Section 2, First, 45 U.S.C. § 152, First.

For a major dispute, the RLA mandates a "virtually endless" process of negotiation and mediation before a party can resort to self-help. *Burlington N. R.R. Co. v. Brotherhood of Maint. of Way Employees*, 481 U.S. 429, 444 (1987); *see generally* 45 U.S.C. §§ 155, 156. While a major dispute is "working its way through these stages [of negotiation and mediation], neither party may unilaterally alter the status quo." *Detroit & Toledo Shore Line R.R. v. United Transp. Union*, 396 U.S. 142, 149 n.14 (1969) (quoting *Railroad Trainmen v. Terminal Co.*, 394 U.S. 369, 378 (1969)). This requirement arises from "three status quo provisions in the Act, each covering a different stage of the major dispute settlement procedures." *Shore Line*, 396 U.S. at 150 (citing RLA Section 7, Section 5, First and Section 10). The federal courts have jurisdiction to enjoin a party from making unilateral changes to the status quo pending exhaustion of the major dispute resolution processes. *See, e.g., Shore Line.*

For minor disputes, however, resolution by a binding arbitration procedure, not negotiation, is the primary means of settlement. The Act requires that airline employers and

unions establish a forum known as a system board of adjustment, which has exclusive jurisdiction over disputes relating to the enforcement or interpretation of collective bargaining agreements. *See* 45 U.S.C. § 184; *Conrail*, 491 U.S. at 312; *Andrews v. Louisville & N. R.R.*, 406 U.S. 320 (1972); *Pennsylvania R.R. v. Day*, 360 U.S. 561 (1961). The courts may enjoin strikes arising out of minor disputes, in order to protect the jurisdiction and processes of an adjustment board. *Conrail*, 491 U.S. at 304; *Chicago River*, 353 U.S. at 41.

However, there is no "general statutory obligation" to maintain the status quo pending resolution of a minor dispute by the applicable board. *Conrail*, 491 U.S. at 304; *see also id.* at 310. In the case of a minor dispute, then, "*[e]ach side* can act on its interpretation of the existing agreement[3] until the arbitration panel rules otherwise," even if one party's interpretation alters what is perceived to be the status quo. *General Comm. of Adjustment, United Transp. Union v. CSX,*

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3. ABX invites this Court to consider its proposition that only a union is bound to maintain the status quo during a minor dispute, while the employer is under no such restriction. It points to language in *Conrail* and other cases that refer to "the employer's" right to make changes subject to the arbitration process; obviously, the status quo cases refer most often to a carrier's unilateral change because it is generally the employer, not the union, that is in a position to implement its own interpretation of the contract. The fact that this Court has not yet been presented with a situation involving a union's application of its own interpretation does not indicate that the same principles should not apply. To the contrary, such an absurdly skewed and one-sided view of the obligations of the parties would undermine the balance between labor and management that the RLA attempted to create. More basically, however, this argument was never squarely presented to the trial or appellate court in this case and this Court should not even consider the issue.

893 F.2d 584, 594 (3d Cir. 1990) (emphasis added); *see also Air Line Pilots Ass'n v. Eastern Air Lines, Inc.*, 869 F.2d 1518, 1520 (D.C. Cir. 1989); *Burlington Northern R.R. v. United Transp. Union*, 862 F.2d 1266, 1272 (7th Cir. 1988); *Brotherhood of Locomotive Eng'rs v. Boston & Maine Corp.*, 788 F.2d 794, 797 n.5 (1st Cir. 1986). As long as the actions of one party or the other are supported by an interpretation of their agreement that is neither frivolous nor obviously insubstantial, then the dispute is a "minor" one subject only to arbitration, and there is no obligation to maintain the status quo. *Conrail*, 491 U.S. at 304.

In this case, Local 1224 took the position that the real dispute related to whether the contract permitted the crewmembers to decline to bid for open flying even in concert, and the Union's privilege to advise its members of their contractual rights. The Union met its "relatively light" burden of showing that its position was arguably justified under the Contract and was, therefore, a "minor" dispute and not within the jurisdiction of the courts. *Conrail*, 491 U.S. at 304, 307. (To the extent ABX disputed this interpretation of the contract, its recourse was not to seek injunctive relief in the courts but to proceed to resolve this minor dispute through the contractual and statutory methods — which it failed to do.) The lower courts concluded that the primary dispute in this case was not the issue of contract interpretation over open flying rights but the grievance on the three-day scheduling rule, which ABX conceded was minor. Under either view, however, all of the conflicts between Local 1224 and ABX were minor disputes under the RLA, and the Sixth Circuit correctly found this matter was not within the courts' jurisdiction.

## III.

## THE SIXTH CIRCUIT'S DECISION IN THIS CASE DOES NOT CONFLICT WITH DECISIONS OF THIS COURT OR WITH THE RULINGS OF ANY OTHER CIRCUIT COURTS.

The Petitioner asserts that the Sixth Circuit contravened earlier decisions of this Court in its conclusions that the courts have no jurisdiction to issue an injunction in the absence of a strike and that "certain types of concerted action" are available during a minor dispute. These rulings do not conflict with this Court's precedent but, rather, are fully consistent with the case law.

ABX maintains that this Court has held that the federal courts have jurisdiction to enjoin not merely strikes and other concerted interruptions of operations but "*all* forms of 'self-help' or 'economic duress' in aid of a minor dispute." Cert. Petition at 16 (emphasis in original). It cites for this proposition *Brotherhood of Railroad Trainmen v. Chicago River & Indiana Railroad Co.*, 353 U.S. 30 (1957), and *Brotherhood of Locomotive Engineers v. Louisville & Nashville Railroad Co.*, 373 U.S. 33 (1963). Contrary to the impression that one might receive from the Petitioner's discussion of these two cases, neither of them ruled on — or even discussed — the question of enjoining actions that do not constitute a strike but involve some lesser form of "economic duress."

In *Chicago River*, the union flatly "called a strike" to push for resolution of a large number of pending grievances, admittedly minor disputes. 353 U.S. at 32. The union argued that the adjustment board procedures under the RLA were

merely voluntary and that, as the Court described it, the parties should be free to "resort to economic duress" if they chose. *Id.* at 34. However, despite the general reference to "economic duress," there was no activity involved in *Chicago River* other than an impending strike, and this Court never even considered such a distinction. Rather, the Court used the occasion to affirm the federal courts' authority "to issue necessary injunctive orders [to enforce compliance with the requirements of the Railway Labor Act]," *id.* at 42 (brackets in original), and to harmonize the RLA with the anti-injunction provisions of the Norris-LaGuardia Act, 29 U.S.C. §§ 101-115. *Id.* at 40-42.

Similarly, this Court's decision in *Louisville* reaffirmed that a union may not strike over a minor dispute, in that case to enforce its interpretation of an adjustment board decision. Again the Court rejected an argument that in certain situations during a minor dispute the parties could be free to "resort[] to economic force," 373 U.S. at 40, but, again, the only economic self-help at issue was a full-blown strike. *Id.* at 34-35. Despite the Court's use of somewhat broader terms as synonyms for a strike, both of the cited cases involved out-and-out work stoppages that would have shut down the rail carrier involved and that have no relation to the sort of activity at issue in this case, which the Sixth Circuit concluded did not constitute either a strike or an interruption of the Company's operations.

This Court has recognized that the Norris-LaGuardia Act generally restricts the power of the federal courts to issue injunctions in labor disputes, holding only that certain provisions of the RLA take precedence over the more general Norris-LaGuardia provisions. *Louisville*, 373 U.S. at 42; *Chicago River*, 353 U.S. at 41-42. Accordingly, the courts

may enjoin strike actions that are intended to avoid or defeat the statutory processes for resolving minor disputes. *Louisville*, 373 U.S. at 38-42; *Chicago River*, 353 U.S. at 40-42.

In the present case, not only was there no "strike" but there also was no intended or actual evasion of the dispute resolution and arbitration procedures. There were a large number of disputes pending between the parties in August 1997, but they were being processed as grievances through the contractual steps; specifically, the dispute over the three-day scheduling rule was in the form of a grievance that was expedited to arbitration in October 1997. *See* Appellate Opinion, Cert. Petition App. at 3a; Findings & Conclusions, Cert. Petition App. at 19a-20a. The Petitioner's assertion that the Sixth Circuit "refused to enforce the minor dispute resolution procedures," Cert. Petition at 19, thus is demonstrably incorrect. In fact, the open flying "ban" did not subvert or impede the parties' arbitration procedures; unlike in *Louisville* and *Chicago River*, there was no need or justification for an injunction to preserve the purposes and processes of the Act.

ABX also claims the Sixth Circuit's decision "squarely conflicts" with recent decisions of the Seventh and Eleventh Circuits. To the contrary, those other decisions are readily distinguishable both legally and factually. Both of the cited cases involved employee or union activity that had an enormous impact on a passenger carrier's operations and flight schedule, and each occurred in the context of a major dispute, when a union was attempting to exert pressure on the employer in contract negotiations.

As already discussed, both the Seventh Circuit's decision in *United Air Lines, Inc. v. International Association of Machinists*, 243 F.3d 349 (7th Cir. 2001), and the Eleventh Circuit's case of *Delta Air Lines, Inc. v. Air Line Pilots Association, International*, 238 F.2d 1300 (11th Cir. 2001), involved concerted activity that had a substantial impact on the employer's operations, including grounded aircraft and numerous delayed or cancelled passenger flights. In this case, on the other hand, the uncontroverted evidence was that there was no such disruption to ABX's service. The facts in those other cases may have justified a conclusion that the unions' actions were strikes or unlawful self-help that were subject to being enjoined. However, there is no conflict with the Sixth Circuit's conclusion that the circumstances in this case simply did not constitute a strike that would permit judicial interference.

Second, and perhaps more significantly, both of the cited cases occurred in the context of a major dispute, when the parties were engaged in collective bargaining for a new labor contract. In the present case, however, the dispute is concededly minor. ABX presents complicated arguments for why this important distinction should be overlooked, but its arguments ignore the very real differences in both the statutory processes and the rights and obligations of the parties that turn on whether a dispute is major or minor. As noted, in a minor dispute "[e]ach side can act on its interpretation of the existing agreement. . . ." *General Comm. of Adjustment, United Transp. Union v. CSX*, 893 F.2d 584, 594 (3d Cir. 1990); *see also Conrail*, 491 U.S. at 304. As long as they did not engage in a strike or other concerted interruption of ABX's operations, Local 1224 and the crewmembers were free to act on their interpretation of the contract with regard to open flying even during the pendency

of a minor dispute. By contrast, in a major dispute neither party may resort to self-help to pressure the other side to accede to its bargaining demands unless and until the "virtually endless" negotiation and mediation process has concluded. *Burlington N. R.R. Co. v. Brotherhood of Maint. of Way Employees*, 481 U.S. 429, 444 (1987). The cited cases from two other circuits do not present a conflict with the Sixth Circuit's decision here and do not justify this Court exercising its authority to hear the case.

## IV.

## THIS CASE PRESENTS NO URGENT ISSUE UNDER THE RAILWAY LABOR ACT THAT REQUIRES THIS COURT'S ATTENTION.

The Petitioner implores the Court to hear this case on the grounds that it raises an important but unsettled question of law; specifically, it claims that what constitutes an "interruption of operations" and an unlawful act of "self-help" are issues "of extreme importance to the Nation's rail and air transportation systems." Cert. Petition at 25. ABX argues that the Sixth Circuit's decision leaves the lower courts at sea regarding the standards for determining when concerted activity rises to the level of an interruption of operations that may be enjoined. The Union submits that the appellate court's decision is both clear and reasonable and that the Petitioner's panicked view of both the case law and the current state of labor-management relations under the RLA is unpersuasive.

The case law that has been discussed here makes clear that there is no epidemic of concerted activity in this industry that inflicts harm upon employers but that is outside the courts' jurisdiction to enjoin. To the contrary, all of the

reported cases — with the lone exception of the one now before the Court — involved grounded aircraft or stopped trains, absent or unavailable pilots and crewmembers, delayed or cancelled flights or stranded passengers. Those cases quite clearly involved either flat-out strikes or clearly identifiable "interruptions of operations" for the affected carrier, and in all of them the courts exercised their jurisdiction to protect the public interest in transportation. In this case, there were no such effects and no grounds for judicial intervention.

ABX questions how trial courts in the Sixth Circuit will know when the economic effects of particular union or employee activity will be sufficient to constitute an "interruption." Quite obviously, as the appellate court indicated, economic harm that affects the regular operations of the carrier — such as by forcing it to cancel or delay flights — would meet that standard. However, the circumstances in which that issue might be presented are likely to be rare, as demonstrated by the fact that the situation presented in this case has not been confronted by other courts to date. If a similar circumstance is presented in the future, the lower courts are fully capable of evaluating the facts and applying the existing law in the same case-by-case manner in which the common law always has developed. Certainly, there is no urgent need for this Court to attempt to define the parameters of the law in this area merely for hypothetical cases in the future and no reason for it to grant certiorari on this grounds.

## CONCLUSION

Respondent respectfully requests the Court to deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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# APPENDIX

# APPENDIX — PORTIONS OF COLLECTIVE BARGAINING AGREEMENT BETWEEN ABX AIR, INC. AND THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AIRLINE DIVISION, EFFECTIVE JUNE 25, 1997

## ARTICLE 13 – SCHEDULING

* * *

Section E – Open flying usage following Master Crew Schedule (Award) Distribution

Open Flying shall be distributed in the following order after the regular line(s) of time and reserve line(s) of times are awarded and the schedules are published showing the Open time available for bid.

1. Open Flying time shall be available, by seniority, for bid by any crewmember who:

   a. Needs to make his bid awarded line whole (i.e. reflect 15 days off) . . . .

   b. Requires a Vacation Replacement Trip.

   c. Requires a Training Failure Make-up Trip.

   d. Desire to bid back a day on which they were displaced for training . . . .

*Appendix*

2. Crew Scheduling may assign a replacement trip to a crewmember that fails to bid a trip(s) to make their bid awarded line whole. Such replacement trips shall comply with the line construction rules contained in D.3.a. through d.

3. Open Flying time shall be awarded in accordance with seniority to any crewmember bidding a particular trip, who wishes to pick up additional flying (days and/or hours) on a previously scheduled work day, or day off. Open Flying shall not be awarded if it makes the crewmember illegal, for a preceding or following trip, or violates the provisions of Section P. of this Article.

4. In the event regular lineholders do not bid the equivalent of one (1) day per Regular Line of Time as shown on the Bid Master Crew Schedule [i.e. sixty (60) days bid when there are sixty (60) regular lines of time on the Bid Master Crew Schedule], the Company may assign open flying until an average combined total of one (1) day per Regular Line of Time has been bid or assigned [i.e. with forty (40) days bid the Company may assign twenty (20) days when there are sixty (60) regular lines of time on a Bid Master Crew Schedule]. Open flying shall be assigned in reverse order of seniority at one day per Regular Line of Time to no more than the bottom seventy-five percent (75%) of the lineholders holding Regular Lines of Time as shown on the Bid Master Crew Schedule. If assigning one (1) day per Regular Line of Time to no more than the bottom seventy five percent (75%) of the Regular lines of Time does not meet the requirement above, one (1) additional day may be assigned, in reverse order of seniority, to no

more than the bottom fifty percent (50%) of the line holders holding Regular Lines of Time as shown on the Bid Master Crew Schedule. No assigned trip shall be isolated from the existing blocks of time on the crewmember's line unless it is on the first or last day of the bid period. In no event shall such assignment reduce the blocks of time off below those required in Article 13, Section D.3.a. through e., nor may any line of time contain any block longer than eight (8) days. In addition, a regular line holder shall receive no less than a minimum guarantee of thirteen (13) days off as reflected on the Master Crew Schedule.

5. Open Flying shall be used to construct Build-up Lines in accordance with the scheduling rules contained in Section D.3. of this Article. Build-up Lines shall be constructed any time enough trips are available to build lines with fifteen (15) days away in a thirty (30) day month or sixteen days away in a thirty-one (31) day month. These Build-up Lines shall be offered and awarded to those crewmembers holding Reserve Lines of Time who had bid a Build-up Line on their bid sheet.

6. After Open Flying time has been awarded in accordance with this Section, any remaining Open Flying time or any time which becomes open during the month, shall be awarded to a crewmember(s) in accordance with Section N. of this Article.

* * *

*Appendix*

Section L – Emergency Coverage

1. If, due to unforeseeable circumstances, the Company's crewmember requirements are not met through the provisions of the "Order of call up", (i.e., reserves), the Company may assign emergency replacement crewmember(s).

2. Emergency replacements shall be assigned in reverse order of seniority, to the most junior crewmember available when the need is known, who can take the trip without causing delay of the scheduled departure, provided that such assignment does not reduce the crewmember's number of day(s) off below thirteen (13).

3. If no such crewmember is available, the Company may, under the provisions of Paragraph 1. of this Section, assign a crewmember to a duty that reduces the number of day(s) off below thirteen (13) day(s) off, provided that the crewmember is granted an equal number of day(s) off at a later date. These day(s) off shall be granted during the same bid period if possible; however, under all circumstances within thirty (30) days of the time the assignment was made.

4. Crewmembers assigned under this emergency replacement policy shall be compensated in accordance with Article 19 of this Agreement, in addition to their monthly guarantees for that bid period.

* * *

*Appendix*

Section N – Continual Open Flying

1. The Company shall maintain a Continual Open Flying (COF) bid . . . .

* * *

4. Open Flying time may be offered to management crewmember(s) for their proficiency.

5. Open Flying time may be assigned to crewmember(s) holding Reserve line(s) of time.

* * *

7. Open Flying time shall be assigned to crewmember(s) in reverse order of seniority in accordance with Section L. of this Article.

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